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CASE NO. 84-349

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1983

ELLEN GIBNEY, et al.,

Appellants

-vs-

TOLEDO FEDERATION OF TEACHERS, et al.

Appellees

* * * * *

On Appeal From the Court of Appeals
of Ohio, Sixth Appellate District

* * * * *

APPELLEE TOLEDO FEDERATION OF TEACHERS' MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Toledo Federation of Teachers moves the Court to dismiss as moot the appeal herein or, in the alternative, to affirm the judgment of the Sixth District Court of Appeals of Ohio on the ground that this appeal presents no substantial federal question not previously decided by this Court.

I. STATEMENT

Appellee Toledo Federation of Teachers (hereinafter referred to as TFT) is the exclusive bargaining agent for all teachers employed by appellee Toledo Board of Education (hereinafter referred to as the Board). Appellants are teachers employed by the Board and are not members of TFT.

Pursuant to a collective bargaining agreement between TFT and the Board, effective August 1, 1982, all teachers who were not members of TFT were required to pay an agency shop fee to TFT in order to share in the costs of collective bargaining. TFT notified all non-member teachers of

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I. STATEMENT

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Pursuant to a collective bargaining agreement between TFT and the Board, effective August 1, 1982, all teachers who were not members of TFT were required to pay an agency shop fee to TFT in order to share in the costs of collective bargaining. TFT notified all non-member teachers of

their obligation to pay an agency shop fee and explained the deadline and procedures for payment. TFT further notified all non-member teachers of an internal rebate procedure and their right to a rebate, upon written objection, of the portion of their fee which would otherwise be expended for political or ideological causes unrelated to collective bargaining.

Each appellant refused to pay their agency shop fee. None of the appellants ever submitted a written objection to TFT about spending a portion of their fee for political or ideological causes nor did any of them avail themselves to TFT's internal rebate procedure.

On January 11, 1983, TFT filed suit seeking to collect the agency fee appellants owed. Appellants answered by denying the debt and counterclaimed pursuant to 42 U.S.C. §1983, acknowledging TFT's right to collect an agency shop fee but challenging TFT's alleged "intent of using" the fee "in part for political and ideological causes."

TFT prevailed by summary judgment in the trial court on August 15, 1983. The trial court was affirmed by the Sixth District Court of Appeals of Ohio on February 3, 1984 and the Ohio Supreme Court denied further review on June 6, 1984.

II. ARGUMENT

Appellants claim that this Court should exercise jurisdiction over this appeal pursuant to 28 U.S.C. §1257(2), challenging the Sixth District Court of Appeals' alleged construction of Sections 3313.17, 3313.20, 3313.33, 3313.47 and 3319.08 of the Ohio Revised Code. (Jurisdictional Statement, p. 3) According to appellants, the Sixth District Court of Appeals "held that these statutes authorize a judgment for TFT which licensed the use of non-union members' fees for purposes other than collective bargaining." (Id. at 4) (Emphasis added.)

Appellants' challenge to the alleged construction of the various sections of Chapter 3313 and §3319.08 of the Ohio Revised Code is now moot

[1] because, as appellants acknowledge in their Jurisdictional Statement at page 3, the state of Ohio, effective April 1, 1984, adopted a comprehensive statutory plan under Chapter 4117 of the Ohio Revised Code covering agency shop fees. Accordingly, Ohio currently has a "statute specifically authorizing or prohibiting agency shop fees." (Id. at 4) However, Ohio's Public

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[1] As the Court explained in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937):

> A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical nature; from one that is academic or moot. The controvery must be definite and concrete touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. [citations omitted.]

because, as appellants acknowledge in their Jurisdictional Statement at page 3, the state of Ohio, effective April 1, 1934, adopted a comprehensive statutory plan under Chapter 4117 of the Ohio Revised Code covering agency shop fees. Accordingly, Ohio currently has a "statute specifically authorizing or prohibiting agency shop fees." (Id. at 4) However, Ohio's Public

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Employee Collective Bargaining statute (R.C. Chapter 4117) has not been drawn into question in the case at bar nor tested in the courts below. Appellants' appeal is therefore moot. See: Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919); United States v. Alaska S. S. Co., 253 U.S. 113 (1920); Local No. 8-6 v. Missouri, 361 U.S. 365 (1960).

Appellants' appeal is moot on an alternative ground. In addition to Ohio's enactment of Ohio Revised Code Chapter 4117, effective April 1, 1984, TFT has implemented a new internal rebate procedure in light of O.R.C. Chapter 4117 and this court's decision in Ellis v. Railway Clerks, ____ U.S.____, 104 S. Ct. 1883 (1984).

Pursuant to O.R.C. §4117.09 (set forth in the Appendix) and the collective bargaining agreement between TFT and the Board, all non-union teachers are charged an agency shop fee which is collected by the Board by ten monthly payroll deductions beginning in September of the school year. The Board then processes and forwards each payroll

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Pursuant to O.R.C. §4117.09 (set forth in the Appendix) and the collective bargaining agreement between TPT and the Board, all non-union teachers are charged an agency shop fee which is collected by the Board by ten monthly payroll deductions beginning in September of the school year. The Board then processes and forwards each payroll

deduction to TFT with the first such payment being received at the beginning of October.

Under TFT's new internal rebate procedure, a non-member teacher who desires a rebate for that portion of the agency shop fee that would otherwise be spent on "partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining" (O.R.C. §4117.09(c)), simply needs to send written notification to TFT on or before October 1 of the school year.[2] Upon receipt of such notification and subsequent receipt of one-tenth of the agency shop fee from the Board, TFT immediately transfers an objecting non-member teacher's rebate to an interest bearing escrow account pending actual refund of the rebate. If the objecting non-member wishes to further object to the amount of the

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[2] Otherwise an objecting non-member teacher can send written notice to TFT within 20 days of his/her first day on the job.

rebate, the rebate funds remain in the interest bearing escrow account pending a resolution under TFT's internal rebate procedure which now provides for review by the new Ohio State Employment Relations Board pursuant to O.R.C. 4117.09(c).

As an example, for the current 1984-85 school year, teachers who do not belong to TFT and who desired a rebate of that portion of their agency shop fee which would otherwise be used for political and ideological activities unrelated to collective bargaining, notified TFT in writing by October 1, 1984. On October 3, 1984, TFT received from the Board a check for the first installment of union dues and agency shop fees. [3] On October 5, 1984, TFT cashed the check and immediately deposited into a separate interest bearing escrow

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[3] The Board sends TFT one lump sum check after it has made each of the ten payroll deductions. The check includes both the union dues and agency shop fees collected.

account those funds which are to be rebated to objecting non-member teachers. If a non-member teacher decides to object to the amount of the rebate, the rebate funds will remain in the escrow account pending the actual refund.

Appellants' basis for their appeal at bar is their allegation that TFT would have used a portion of their agency shop fees for political or ideological causes unrelated to collective bargaining. (Jurisdictional Statement, pgs. 2, 4, 11, 12, 13, 14, 16-17) As appellants explain, their concern was that "TFT will have the unfettered use of their fees over a long period of time, subjecting them to the certainty that in the interim their refunds will be spent on political and ideological activities unrelated to collective bargaining." (Id. at 16) (Emphasis added.)

Regardless of the validity of appellants' concern over the use of their agency shop fee under TFT's old internal rebate procedure, their concern is presently clearly moot under TFT's new internal rebate procedure as discussed above. An objecting

non-member teacher's rebate is currently immediately transferred into an interest bearing escrow account upon receipt of one-tenth of the agency shop fee from the Board. The rebate remains in the interest bearing escrow account until the rebate is actually refunded to the objecting non-member teacher. Thus, under the new internal rebate system, TFT never even has the opportunity to use objecting non-member teachers' refunds, even temporarily, for political or ideological causes unrelated to collective bargaining. Therefore, appellants' allegation that TFT "forced loans to subsidize their political and ideological activities unrelated to collective bargaining" is moot since TFT immediately and permanently segregates rebate funds in a separate interest bearing escrow account. (Id. at 12)

It is important to note that the case at bar arose over appellants' failure to pay any of their 1982-83 school year agency shop fees. [4]

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[4] Similiarly, none of the appellants ever notified TFT prior to

Recently, in late August 1984, appellants did pay in their 1982-83 agency shop fee and have already received a rebate. Thus, TFT never had the opportunity to use any portion of appellants' 1982-83 agency shop fees for political and ideological causes unrelated to collective bargaining.

Notwithstanding that appellants' appeal should be dismissed for being moot, the decision of the Sixth District Court of Appeals of Ohio should be affirmed because the appeal presents no substantial federal questions not previously decided by this Court.

The Sixth District Court of Appeals held in the syllabus of its Opinion that:

> 1. Where a labor organization is the exclusive representative of the employees or a class of the employees of an employer, the labor organization may properly assess and collect a service fee from non-member employees,

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(cont.) [4] filing their Answer and Counterclaim that they desired to exercise the right to a rebate of a portion of their agency shop fee or availed themselves to TFT's internal rebate procedure.

represented thereby, in accordance with the terms of its collective bargaining agreement. Jefferson Area Teachers Assn. v. Lockwood (1982), 69 Ohio St. 2d 671, followed.

2. The use of such service fees for the promotion of political activities, over objection, is, however, violative of the non-member's first amendment rights. Abood v. Detroit Board of Education (1977), 431 U.S. 209, followed.

3. Where a refund procedure by which a non-member may protest the use of any portion of his service fee for political activities is provided, such procedural remedy must be exhausted prior to the assertion of any claim regarding such expenditures in a judicial proceeding.

(Jurisdictional Statement, Appendix p. 2a.)

In their Jurisdictional Statement and in the courts below, appellants have not challenged the first two paragraphs of the Sixth District Court of Appeals' syllabus, but instead, challenge the third paragraph because they allege that the lower court's decision allows TFT to unconstitutionally use a portion of their agency shop fee for political or ideological causes unrelated to collective bargaining. "In other words, [appellants'] grievance

stems from the spending of their funds for purposes not authorized by the [Constitution] in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." Machinists v. Street, 367 U.S. 740, 771 (1961)

In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), this Court stated that courts must fashion a remedy to a non-member teacher's objection to the use of an agency shop fee which does not restrict the "union's ability to require every employee to contribute to the cost of collective bargaining activities." (Id. at 237.) In fact, Justice Stevens in his concurring opinion specifically recognized the use of establishing a union's internal rebate procedure to avoid the risk that objecting non-members' funds would be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Id. at 244. Of course, as discussed above, TFT has established an internal rebate procedure which does avoid the risk that objecting non-member teachers' agency

fees will be used, even temporarily, for unconstitutional purposes.

More recently, this Court in Ellis v. Railway Clerks, ____ U.S. ____, 104 S. Ct. 1883 (1984), ruled upon the statutory adequacy of a union's "pure" [5] rebate procedure under the Railway Labor Act. [6] Specifically, the Court held that given the existence of "acceptable alternatives," a pure rebate scheme violated the Railway Labor Act because it allowed an objecting non-members' funds

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[5] A "pure" rebate procedure is one in which the union exacts and uses full dues and refunds months later that portion of the dues which the union was not allowed to exact in the first place. Ellis, at 1890.

[6] Ellis did make clear that the Court's previous decisions in Street, supra, Abood, supra, and Railway Clerks v. Allen, 373 U.S. 113 (1963), had not passed upon the "statutory or constitutional adequacy of the suggested remedies" for non-union members who object to the use of their agency shop fees for political and ideological causes unrelated to collective bargaining. Ellis, at 1890.

to be temporarily put to improper uses. Id., at 1890. One of the "acceptable alternatives" to a pure rebate system was an internal rebate procedure which implemented an interest bearing escrow account. Id. Again, as discussed above, TFT has implemented an interest bearing account in their internal rebate procedure to avoid even the opportunity to temporarily put an objecting non-member teacher's agency shop fee to improper uses.

Thus, the Ohio Sixth District Court of Appeals' ruling that a non-member teacher must avail him or herself to a union's internal rebate procedure before protesting the use of a portion of an agency shop fee in a judicial proceeding is clearly consistent with this Court's prior rulings and should, therefore, be affirmed.

III. CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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Counsel For Appellee

CERTIFICATION

This is to certify that a copy of the Appellee Toledo Federation of Teachers' Motion to Dismiss or Affirm was mailed by ordinary U.S. Mail this ____ day of November, 1984 to David T. Bryant, National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia 22160; to Frank T. Pizza, 1000 National Bank Building, Toledo, Ohio 43604; and to Susan Hayest, Office of the Attorney General, 34 North High Street, 2d Floor, Columbus, Ohio 43215.

David M. Schnorf

§4117.09 [Written agreement executed by both parties.]

(A) The parties to any collective bargaining agreement shall reduce the agreement to writing and both execute it.

(B) The agreement shall contain a provision that:

(1) Provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances, and disputed interpretations of agreements, and which is valid and enforceable under its terms when entered into in accordance with Chapter 4117. of the Revised Code. No publication thereof is required to make it effective. A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business.

(2) Authorizes the public employer to deduct the periodic dues, initiation fees, and assessments of members of the exclusive representative upon presentation of a written deduction authorization by the employee.

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit. Any public employee organiation representing public employees pursuant to Chapter 4117. of the Revised Code shall prescribe an internal procedure to determine a rebate, if any, for nonmembers

which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to such determination may be filed with the state employment relations board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the state employment relations board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine (sic) to the work of employee organizations in the realm of collective bargaining.

Any public employee who is a member of and adheres to established and traditional tenents or teachings of a bona fide religion or religious body which has historically held conscientious objections to joining or financially supporting an employee organization and which is exempt from taxation under the provisions of the Internal Revenue Code shall not be required to join or financially support any employee organization as a condition of employment. Upon submission of proper proof of religious conviction to the state employment relations board, the board shall declare the employee exempt from becoming a member of or financially supporting an employee organization. The employee shall be required, in lieu of the fair share fee, to pay an amount of money equal to such fair share fee to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code mutually agreed upon by the employee and the representative of the employee organization to which the employee would otherwise be required to pay the fair share fee. The

employee shall furnish to the employee organization written receipts evidencing such payment, and failure to make such payment or furnish such receipts shall subject the employee to the same sanctions as would nonpayment of dues under the applicable collective bargaining agreement.

No public employer shall agree to a provision requiring that a public employee become a member of an employee organization as a condition for securing or retaining employment.

(D) No agreement shall contain an expiration date that is later than three years from the date of execution. The parties may extend any agreement, but the extensions do not affect the expiration date of the original agreement.